

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 10th day of February, two thousand eleven.

PRESENT: GUIDO CALABRESI,
GERARD E. LYNCH,
Circuit Judges,
J. GARVAN MURTHA,
*District Judge.**

UNITED STATES OF AMERICA,
Appellee,

v.

No. 09-2477-cr

JAMES REED, also known as Fats, BYRON COBB,
also known as Cobb, THEODORE HUFFMAN,
JAMAR PAUL, also known as Crook, CHRISTOPHER
HUFF, SHELTRICE RHODES, CURTIS MOSS, and
NORMA THOMPSON,
Defendants,

MARTELL L. JORDAN, also known as Telly,
Defendant-Appellant.

* The Honorable J. Garvan Murtha of the United States District Court for the District of Vermont, sitting by designation.

1 FOR APPELLANT: DAVID M. SAMEL, Law Office of David M. Samel, New
2 York, New York.

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4 FOR APPELLEE: STEPHAN J. BACZYNSKI, Assistant United States
5 Attorney, *for* William J. Hochul, Jr., United States Attorney
6 for the Western District of New York, Buffalo, New York.
7

8 Appeal from the United States District Court for the Western District of New York
9 (Richard J. Arcara, *Judge*).

10 UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND
11 DECREED that the judgment of the district court is AFFIRMED.

12 A jury convicted Martell Jordan of conspiracy to possess with intent to distribute or
13 to distribute certain amounts of cocaine, see 21 U.S.C. §§ 841(a)(1), (b)(1)(A), 846;
14 possession with intent to distribute 50 grams or more of cocaine base, see id. § 841(a)(1),
15 (b)(1)(A); possession of cocaine base, see id. § 844(a); and possession of a firearm in relation
16 to a drug trafficking crime, 18 U.S.C. § 924(c)(1), (2). On appeal, he challenges his
17 conviction and sentence both through counsel and *pro se*. Finding no merit in his arguments,
18 we affirm.

19 Jordan first contests the validity of the warrant pursuant to which federal agents
20 searched his home.¹ He argues that the agent who applied for the warrant failed to disclose
21 that the source of his information was a criminal informant, and that omitting this allegedly

¹ The magistrate judge below recommended denial of Jordan’s motion to suppress, and Jordan did not object to the magistrate judge’s ruling. This failure to object ordinarily “waives a party’s right to review.” Fed. R. Crim. P. 59(b)(2). Nevertheless, because we find no merit in his claim, the result does not change even if we overlook the waiver – or, alternatively, if we analyze the prejudice prong of Jordan’s claim that his counsel was ineffective for failing to press the objection, see Kimmelman v. Morrison, 477 U.S. 365, 375 (1986).

1 “critical” information undermined the constitutionality of the government’s search. See
2 United States v. Reilly, 76 F.3d 1271, 1280-82 (2d Cir. 1996). But the agent’s affidavit
3 explicitly described the informant as a “cooperating witness” who was referred to the agent
4 by an Assistant United States Attorney and spoke to the government under a “proffer
5 agreement.” The affidavit thus provided the magistrate with all the information needed to
6 evaluate the informant’s credibility.

7 Jordan also argues that the warrant’s “supporting affidavit did not provide probable
8 cause.” The affidavit relates the cooperating witness’s detailed descriptions of illegal
9 weapons possession and drug activity in the apartment to be searched, as told over the course
10 of multiple interviews. It includes not only the basis for the informant’s knowledge but also
11 the type and amount of drugs being sold, the type of guns present, the layout of the premises,
12 and the appearance of the perpetrators. It also discusses the agent’s corroborative
13 investigation, during which the agent observed the same car that the informant described and
14 learned that a resident of the house has a record with several arrests for drug and firearm
15 offenses. Assuming without deciding that this falls short of providing probable cause, it is
16 not the sort of “bare bones affidavit” that would make reliance upon it unreasonable. United
17 States v. Leon, 468 U.S. 897, 926 (1984) (quotation marks omitted). We therefore cannot
18 say that the affidavit was “so lacking in indicia of probable cause as to render official belief
19 in its existence entirely unreasonable.” Id. at 923.

20 Jordan next argues that the district court relied on erroneous guidelines calculations
21 in setting his 25-year sentence, an argument he admits he did not raise below. We need not

1 decide, however, whether there was any error, plain or otherwise, in Jordan's sentence,
2 because any such error could not matter in this case. At the time of Jordan's sentencing,
3 Second Circuit precedent allowed sentences under 21 U.S.C. § 841(b)(1)(A) and 18 U.S.C.
4 § 924(c) to run concurrently rather than consecutively, see United States v. Williams, 558
5 F.3d 166, 167-68 (2d Cir. 2009), meaning that the district court could have sentenced Jordan
6 to as few as 20 years' total incarceration (the mandatory minimum for a recidivist offender
7 under § 841(b)(1)(A) alone). As we have now recognized, see United States v. Valentin
8 (Mejia), ___ F.3d ___, No. 07-5289-cr (2d Cir. Feb. 9, 2011), the Supreme Court recently
9 rejected this conclusion in Abbott v. United States, 131 S. Ct. 18, 23 (2010), and vacated our
10 Williams decision that had held otherwise, see 131 S. Ct. 632 (2010). Under Abbott, the
11 five-year minimum for § 924(c) *must* run consecutively to any other sentences under the
12 circumstances present in this case. (The government so argued below, albeit recognizing the
13 adverse state of Second Circuit precedent at the time.) Therefore, even if we found error in
14 the district court's Guidelines calculation and remanded for resentencing, Jordan could get
15 no less than the 25-year sentence he is already serving.

16 Jordan next attacks the effectiveness of his counsel below on several grounds. See
17 Strickland v. Washington, 466 U.S. 668, 686 (1984). We have disposed of two of these
18 grounds already: First, Jordan cannot show prejudice from his counsel's failure to press his
19 suppression motion beyond the magistrate judge because we have found that the suppression
20 motion was rightly denied. Second, Jordan cannot show prejudice from the failure to raise
21 certain sentencing arguments because he received the lowest sentence that he may receive,

1 even though he might have received a lower sentence under our then-current but later-
2 overturned precedents. A defendant suffers no cognizable prejudice when he fails to obtain
3 legal error in his favor. See Lockhart v. Fretwell, 506 U.S. 364, 369-71 (1993).

4 Jordan’s other claims of ineffective assistance – involving counsel’s failure to seek
5 a mistrial after a witness’s testimony was struck for improper hearsay and counsel’s failure
6 to call certain other witnesses – are more difficult to evaluate from our vantage point, “on a
7 trial record not developed precisely for the object of litigating or preserving the[se] claim[s].”
8 Massaro v. United States, 538 U.S. 500, 505 (2003). We therefore decline to hear them,
9 without prejudice to Jordan raising them in a subsequent proceeding under 28 U.S.C. § 2255.

10 Finally, Jordan raises a number of additional claims in a supplemental *pro se* brief.
11 He first argues that there was insufficient evidence to convict him of conspiracy. He does
12 not dispute the existence of a conspiracy, but claims that he only bought drugs from the other
13 members of the conspiracy without being a member of the conspiracy himself. See United
14 States v. Hawkins, 547 F.3d 66, 71-72 (2d Cir. 2008). He acknowledges, however, that the
15 evidence showed he and the other conspirators would “pool their money and make a trip to
16 another city where they could secure the needed supply” of drugs. The evidence also showed
17 that he would cook crack with another conspirator and sell drugs with that conspirator. With
18 such evidence, the jury could certainly conclude that Jordan “knowingly joined and
19 participated” in the conspiracy, *id.* at 71, and was not, as Jordan suggests, simply a purchaser
20 who traveled along with others to the same source of drugs, *cf.* United States v. Pressler, 256
21 F.3d 144, 154 (3d Cir. 2001).

1 We may reject Jordan’s other *pro se* arguments without much discussion. (1) “A
2 defendant has no right to confront a ‘witness’ who provides no evidence at trial,” United
3 States ex rel. Meadows v. New York, 426 F.2d 1176, 1184 (2d Cir. 1970), and for this reason
4 Jordan had no right to cross-examine the cooperating witness whose information provided
5 the basis for the warrant. (2) The district court did not violate Jordan’s confrontation rights
6 by admitting a laboratory report and testimony about it when Jordan had stipulated to the
7 report’s admission. “[D]efense counsel may waive a defendant’s Sixth Amendment right to
8 confrontation where the decision is one of trial tactics or strategy that might be considered
9 sound,” United States v. Plitman, 194 F.3d 59, 64 (2d Cir. 1999), and Jordan neither
10 criticizes counsel’s decision to stipulate to the report nor identifies any inaccuracy in the
11 testimony to which he now objects. (3) We decline to address Jordan’s claim of ineffective
12 representation based on counsel’s failure to object to the government’s leading questions on
13 direct examination. Jordan may raise this claim in a § 2255 motion. (4) The alleged
14 misconduct in the prosecutor’s summation, if error at all, was not “so severe and significant
15 as to result in the denial of [Jordan’s] right to a fair trial,” United States v. Locascio, 6 F.3d
16 924, 945 (2d Cir. 1993), especially not under the plain error standard we apply to claims not
17 raised below, see Fed. R. Crim. P. 52(b). (5) Jordan’s *pro se* sentencing arguments could not
18 affect his sentence for the same reason as his counseled sentencing arguments: he may not
19 lawfully receive any shorter sentence on remand than the one he already has.

1 For the foregoing reasons, the judgment of conviction is AFFIRMED.

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3 FOR THE COURT:
4 Catherine O'Hagan Wolfe, Clerk of Court
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